Supreme Court, U.S.
FILED
04-799 DEC 6 - 2004
OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

Mary Ann Smania
Petitioner

v.

Sherwin Abrams, *Attorney*
Abrams and Chapman, *Law Firm*
Lawrence Benjamin, *Attorney*
Lawrence Richman, *Attorney*
Neal, Gerber and Eisenberg, *Law Firm*
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Mary Ann Smania
Petitioner, Pro Se
15815 Acorn Circle
Tavares, Florida 32778
(352) 343-8517

Question Presented For Consideration

The basic issue presented for consideration to this court is the constitutionality of 28 USC § 2072. (28 USC § 2403(a) may be applicable. The question was not certified to the Attorney General pursuant to 28 USC 2403(a).)

I. Does the "circular" authority conferred by acts of Congress enabling the Judiciary to make and enforce its own rules violate the principle of the Separation of Powers as dictated by the Constitution? Alternately, is it within the Court's discretion, under Constitutional standards, to delegate its enforcement power to nongovernmental disciplinary entities, including state bar associations?

II. Does the word "duty," as it appears in the context of the Rules of Court, impose a legal obligation to the Court when applied to members of the bar, or would such an interpretation violate that class's due process rights?

III. Is application of the "safe harbor" provisions of the Rules of Court constitutional when the Court is called upon to consider allegations of perjury by the parties?

IV. Can an attorney or a law firm publish privileged communication to protect itself from accusations of wrongful conduct without violating a client's Fifth Amendment right to protection from self incrimination when the relevancy of the communication has not been previously established by the Court through an evidentiary proceeding?

List of Parties

The caption for this petition includes the parties to the Eleventh Circuit Court of Appeal. The Circuit Court was also petitioned to assert supervisory jurisdiction over the Respondents' attorneys. The Florida law firm of Shutts & Bowen put in its notice of appearance on behalf of Respondents Sherwin Abrams and Abrams & Chapman..

The Florida law firm of Baker & Hostetler did not put in a notice of appearance in the Eleventh Circuit but had noticed the United States Middle District of Florida of its appearance in that court on behalf of Defendants/Respondents Lawrence Benjamin, Lawrence Richman and Neal, Gerber, & Eisenberg. (DE 51, P. 2)[1]

---

[1] References to Documents, not in the Appendix, will be referred to by their docket entry number in the United States Middle District of Florida. "(DE #)"

Table of Contents

Questions Presented.....i

List of Parties.....ii

Table of Contents.....iii

Index of Authorities.....v

Petition For Writ of Certiorari.....1

Citation of Opinions and Orders.....1

Basis for Jurisdiction.....2

Statutory Provision Involved.....2

Constitutional Provisions Involved.....3

Statement of the Case.....3

Summary of Argument.....14

Argument.....16

I. The decision of the Circuit Court to ignore Petitioner's Questions of First Impression raises serious doubt as to the effectiveness of the Appellate Process in exercising supervisory jurisdiction over the errant behavior

of the Court's own officers.....16

II. The Court should give meaning to the Rules of Court by defining the word "duty."..... 19

III. The Court should declare the safe harbor provisions embodied in the rules of court unconstitutional....21

IV. The Court should condemn, as unconstitutional, the practice of publication of privileged information by an attorney or a law firm to protect the attorney or the law firm from accusations of wrongful conduct, without the expressed authority of the Court 27

Conclusion.....30

Appendix Separately Bound

Index of Authorities

Cases

Anti-Fascist Committee v. MCGrath, 341 U.S. 123 (1951)...29

Carter v. Carter Coal Co., 298 U.S. 238 (1936).....25

Cooter & Gell v. Hartmarx Corp. 496 U.S. 384 (1990)....19, 20

Jones v. Clinton, 206 F. 3d 811 (8th Cir. 2002).....23

Keller v. State Bar of California et al., 496 U.S. 1.....26

Marbury v. Madison, 1 Cranch, 137 (1803).....15

Miller v. Fenton, 474 U.S. 104 (1985).....20

Pierce v. Underwood, 487 U.S. 552 (1987).....20

Roell v. Withrow, ____U.S.____. 123 S.Ct. 1696 (2003).....18
(Justice Thomas Dissenting).....19

Rostker v. Goldberg, 453 U.S. 57 (1981).....29

United States v. Oregon State Medical Society, 343 U.S. 326
(1952).....20

Statutes and Rules

18 USC § 1621.....23

28 USC § 331.....17

28 USC § 332 (d)(4).....17

28 USC § 636.....6, 18

28 USC § 636 (c.).....5, 6

28 USC § 636 (c)(1).....19

28 USC § 1254 (1).....2

28 USC § 1332.....2

28 USC § 2071 (a).....17

28 USC § 2072.....*passim*

28 USC § 2403(a).....i

Eleventh Cir.R. 28-1(i.)(ii.).....14

Fed.R.Civ.P. 1.....21, 24

Fed.R.Civ.P. 4.....4

Fed.R.Civ.P. 4(d)(2).....4, 5, 7, 8, 9, 20

Fed.R.Civ.P. 11.....*passim*

Fed.R.Civ.P. 11 (b)(1)(2)(3).....9

Fed.R.Civ.P. 11 (b)(4).....24

Fed.R.Civ.P. 11(c)(1)(A).....10, 11, 22, 23

Fed.R.Civ.P. 11(c)(1)(B).....24, 25

Fed.R.Civ.P. 12.....9

Fed.R.Civ.P. 52.....20

Fed.R.Civ.P. 55(a)(b)(2).....7

Fed.R.Civ.P. 73.....5, 6, 18

Fed.R.Civ.P.77(a).....11

FRAP 46 (c).....13

M.D.Fla.Loc.R. 3.01(g).....10, 11

Supreme Court Rule 6.....29

United States Constitutional Provisions

Articles I, II, III.....*passim*

Article I, Section 1 & 3.....2

Article II, Sections 1 & 2.....2, 23

Article III, Section 1.....2, 26

Fifth Amendment.....2, 12, 28

Other Authorities

ABA Model Code of Professional Responsibility (2003)
DR 4-101 (C).....27
DR 4-101 (D).....27

ABA Model Rules of Professional Conduct,
Preamble.....18

Advisory Committee Notes, (1993) *Fed. Rules of Civil Procedure*.....25

Black's Law Dictionary (5th & 7th Ed.).....23

Declaration of Independence, (1776).....14, 15

Federalist, Paper No. 10 (1787).....10

Gonzalez, Albert R., "Letter to the ABA," March 22, 2001....26

Manual For Complex Litigation, Second, § 42.3.....25

Model Penal Code, Section 241.1.....23

Scalia, Antonin, *A Matter of Interpretaion- Federal Courts And The Law*, Princeton University Press, (1997).....19

Senate S. 3086 (1996).....17

Petition For Writ of Certiorari

The failure to address Petitioner's arguments by both the District Court and the Circuit Court in a way which would have allowed the Pro Se Petitioner to proceed with legal counsel has exposed a compromise in the system of checks and balances embodied in the Separation of Powers. This Constitutional breach raises serious concern for the Judiciary's independence as a separate but equal branch of government. This Court should grant this Petition for Writ of Certiorari to give legal meaning to the role of the Court in governing its own behavior.

Citation of Opinions and Orders

The Eleventh Circuit's opinion of affirmation is unpublished. "App. B" The Eleventh Circuit's order denying Motion for Rehearing En Banc is unreported. "App. A" Also unreported are Magistrate's order denying the Petitioner's Certificate of Interested Persons, "App. J," the Magistrate's stamped endorsed order granting an extension of time for two of the Defendants, "DE 23," the District Court's order vacating the Magistrate's order to extend time and issuing a new order, "App. I," the Magistrate's omnibus order denying Petitioner's Motions for Default Judgments against four of the five defendants, as well as her Motion to Recover Costs For Service, her Renewed Motion to Recover Costs, her Motion For a More Definitive Statement, and her Motion to Strike Declaration of Lawrence Benjamin, "App. H," the District Court's order to the Petitioner to Show Cause as to why the case should not be dismissed, App. G, the District Court's order to deny Petitioner's Motion for Certification of an Interlocutory Appeal and Motion to Compel, "App.F," the District Court's *de* novo review of the Magistrate's

orders and omnibus order reformulating Petitioner's Motion For Certification of an Interlocutory Appeal and her memorandum, as well as all of her other motions into "objections" of the Magistrate's orders and overruling the "objections," "App. E," the District court's order granting Defendants' motions for dismissal, "App. D," and the District Court's Denial of the Petitioner's Motion for Reconsideration, "App. C."

Basis For Jurisdiction

The 11th Circuit Court's denial of the Petitioner's Motion For Rehearing En Banc was delivered on September 8, 2004. Petitioner invokes this Court's jurisdiction under 28 USC § 1254(1).

Statutory Provision Involved

28 USC § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c.) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Constitutional Provisions Involved

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. (Article I, Section 1)

The executive power shall be vested in a President of the United States of America... [The President] shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Article II, Sections 1, 2)

The Senate shall have the sole power to try all impeachments. (Article I, Section 3)

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish (Article III, Section 1)

[No person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. (Amendment V)

Statement of the Case

The Petitioner Pro Se, Mary Ann Smania, "Smania," a citizen of Florida, filed a legal malpractice lawsuit pursuant to 28 USC § 1332 and Article III subsection 2 of the United States Constitution, written in the narrative, in the United States Middle District of Florida against three attorneys and two law firms sited in Illinois. (DE 1) In seeking relief the Petitioner apologized for

her clumsiness with legalese and asked the Court for leave to amend the complaint so that she could proceed as represented by competent legal counsel in Florida. Smania is not a lawyer.

Smania's father had died in 1998 a resident of Florida. Smania was his only child, only heir at law, and sole income beneficiary of a trust established by her father when he was alive. Smania was also named a Fiduciary trustee of the trust by her father upon his demise, which probate was opened in Florida by the executor of her father's estate under the legal supervision of a Florida law firm. However, through a set of circumstances settled in an Illinois Probate Court, Smania had also assumed the additional Fiduciary position of successor Executor of her father's estate just prior to filing her complaint in Florida's Middle District. (DE 1 - Text)

Under pressure from the statute of limitations and mindful of the fact that she could not represent either an estate nor a trust in Florida pro se, Smania sued the defendants as the sole heir of the estate and sole income beneficiary of the trust, expecting that competent Florida legal counsel would be welcomed by the court to amend the complaint and represent Smania in her Fiduciary capacities. As stated in her complaint, Smania was no longer associated with the Florida law firm that opened the probate in Florida, but was represented by counsel in Illinois. (DE 1 - Text)

In lieu of serving a summons, Smania elected to notice each defendant of the lawsuit through the procedure outlined in Rule 4 (FRCP), which states in pertinent part that, "An individual, corporation, or association that is subject to service under subdivision (e),(f) or (h) and that receives notice of an

action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons." (Emphasis Added) (Fed.R.Civ.P. 4(d)(2)).

As a non-lawyer, Smania believed that the word "duty" meant that the defendants, all of whom are members of the bar, were legally obligated to avoid unnecessary costs of serving a summons. The gist of her cause of action was simple. The defendants had put Smania in harms way with the IRS.

Shortly after Smania noticed each of the defendants, the District Court sent a form letter to Smania that summarized a "program" through which jurisdiction could be given to a magistrate in accordance with the provisions of 28 USC § 636(c). The letter explained that if she decided to decline consent that fact "would be held in confidence by the Clerk." Accompanying the form letter were blank consent forms which stated in clear English that pursuant 28 USC 636(c) and Fed.R.Civ.P. 73, Smania could withhold her consent to jurisdiction from the magistrate "without adverse consequences."

The assigned magistrate was the same magistrate who had presided over a district court case in which Smania had attempted to introduce cameras into the court. He had reported her to the Florida Bar for her association with the pro se litigant in that case, Norma Vaughan, who had brought her social security appeal to the district court. Smania reasonably felt it was in her best interest to withhold jurisdiction from that particular magistrate. Therefore, when Smania filed her response to an "Order On Interested Persons and Corporate Disclosure," she stated her belief that the assigned magistrate would not be impartial and should recuse himself from the case. (DE 4) The

clear language assurance of no adverse consequences in both Fed.R.Civ.P 73 and 28 USC § 636 led Smania to envision an automatic recusal by the assigned Magistrate through which the Clerk would simply refer the case to another Magistrate. However, that did not happen. Instead, Smania was unexpectedly ordered to appear before the Magistrate. (DE 7)

Also convoluting the process was the fact that four of the five defendants had apparently decided not to timely comply with their "duty" to avoid the costs of serving a summons. Their behavior was described by Smania in an affidavit. (DE 13) Two of the defendants, Abrams & Abrams and Chapman, finally accepted service personally (DE 9 &12). Defendants Richman and Benjamin, on the other hand, avoided service of the summons by the process server, who finally left their summonses with the secretary of their law firm. (DE 10 & 11)

Shortly thereafter Defendant Abrams, who is not a member of the Florida Bar, filed a notice of appearance in the United States Middle District of Florida (DE 14). Abrams wrote a letter to Smania stating, "Contrary to the statements in your affidavit of March 11, 2003, my law firm and I did comply with **our duty** under Rule 4 of the Federal Rules of Civil Procedure." (DE 15) Neither Abrams nor his law firm appeared or were represented at the hearing scheduled by the Magistrate. The other defendants were represented by the Florida law firm of Baker & Hostetler. (DE 51, P. 2, L. 8-10)

At the hearing, the Magistrate confronted Petitioner with what she had written about him, revisited their previous entanglement in the Vaughan case, and argued with her as to the correct interpretation of Rule 73 (FRCP) and 28 USC § 636. The

Magistrate refused to recuse himself with the words,. "In this case I do find that I have a **strong duty** to sit." (DE 51, P. 35, L 4-5)

> "As far as an invalid delegation of power to the Florida Bar, I delegated no power to the Florida Bar. I, I simply referred the matter for them to exercise their **own independent power** because it's Florida, the Florida Bar and not this Court that has the primary responsibility for unauthorized practice of law matters." (DE 51, P. 30, L 6)

The next day, unbeknownst to Smania, Defendants Richman and Benjamin filed a motion to extend their time to respond to the complaint to "April 31, 2003." Their motion was referred to the Magistrate. (DE 17) Since Smania was unaware that a motion to extend time had been filed, she did not address it when she applied for default judgments, pursuant to Fed.R.Civ.P. 55(a)(b)(2), against Richman and Benjamin as well as Abrams and his law firm, Abrams & Chapman. (DE 18, 19, 20, 21) At that time Defendant Neal, Gerber & Eisenberg was not in default since they had timely returned the waiver. (DE 8)

Upon learning about the Richman-Benjamin motion to extend time, Smania filed a formal motion to recover costs of service from Richman and Benjamin specifically, pursuant to Fed.R.Civ.P. 4(d)(2), concentrating her argument on the clear language of the rule that required Richman and Benjamin to show "good cause" for their non-compliance in performing their duty to the court. (DE 25) On the same day, apparently, Abrams and his law firm, as represented by the Florida law firm of Shutts & Bowen, who had not put in a notice of appearance previously, motioned the court to dismiss the case for lack of personal jurisdiction. (DE 26) The motion was grounded in a bare bones

affidavit made by Abrams generally denying the allegations of the legal malpractice suit. (DE 26, Exhibit A) Absolutely no reference was made to Smania's application for a default judgment against them.

The next day, apparently, Defendant Benjamin filed a forty-five page document, entitled "Declaration of Lawrence Benjamin," made under penalties of perjury, which attached letters Smania had written to Richman and Benjamin while under the impression that she was a client of their law firm, Neal, Gerber, & Eisenberg. (DE 29, Exhibits A & B) The Benjamin Declaration was incorporated by the three Defendants in their motion to dismiss apparently filed simultaneously in a separate document, which argued in part that Benjamin and Richman had never been properly served. (DE 27) By that time Neal, Gerber & Eisenberg was already in default. (DE 8)

Further complicating the issues before the Court, the previous day the Magistrate, via stamped endorsement, had granted the Richman-Benjamin motion to extend time (DE 23) with no attention paid to Smania's motion made pursuant to Fed.R.Civ.P. 4(d)(2) nor her application for default judgments against the noncompliant defendants. The next day, the presiding judge, who also was the chief judge, recused herself from the case vacating all orders she had previously issued on the grounds she had a financial arrangement with one of the attorneys involved in the case. (DE 32) Up to that point Smania was the only party who had filed a "Certificate Of Interested Persons." (DE 4) In the meantime the new presiding judge vacated the magistrate's order to extend Richman and Benjamin's time because "April does not have 31 days" and issued a new order which extended their time to May 1, 2003. (App. I) Again, no reference was

made to any of Smania's motions.

The next week Smania renewed her motion previously made pursuant Rule 4 (d)(2). Her renewed argument was grounded in the "spirit of the law" embodied in Fed.R.Civ.P. 11(b)(1)(2)(3)" which reflects the concept that there is a legal obligation for members of the bar to act honorably toward the court. Attached to Smania's motion were exhibits which clearly should have alerted the court to the fact that Defendant Benjamin had lied under penalties of perjury. (DE 43, Exhibits) Also, Smania simultaneously filed a separate motion to strike the Benjamin Declaration, pursuant to Fed.R.Civ.P. 12, on the grounds that it was impertinent and scandalous. (DE 45) Smania asserted, inter alia, that the publication of her letters written while under the expectation of privilege violated the rule governing evidentiary procedure. She encouraged the Court to use its supervisory discretion to severely sanction Benjamin and the Florida law firm representing him, Baker & Hostetler. In the Motion to Strike, Smania attached additional documentation supporting her contention that Benjamin asserted facts, under penalties of perjury, which were blatantly false. (DE 45, Exhibits)

Also on that day, in a separate filing, Smania challenged the Abrams' barebones affidavit with a motion to require him to expand his statements made under oath. (DE 44) Smania noted that Abrams had previously filed an affidavit in the Illinois court which had reflected a substantively different posture. Smania, however, did not attach a copy of the affidavit Abrams filed in the Illinois court.

Benjamin and Richman responded by stating, in pertinent

part, that Smania had not "conferred" with Benjamin and Richman pursuant to Local Rule 3.01(g) before filing her motions. (DE 46) Defendants Neal, Gerber & Eisenberg did not respond nor did Abrams, or Abrams & Chapman. However, it should be noted that the Abrams' legal representative had previously certified to the court the blatantly false assertion that there were no related cases in Illinois or elsewhere. (DE 39)

Exactly one month and a day after the magistrate refused to recuse himself, he denied all of Smania's motions by highlighting Smania's admitted lack of skill in applying legalese, reformulating her arguments and effectively declaring them moot, and categorizing the Benjamin Declaration as having full force and effect under the law. (App. H) No consideration was given to any of the documentation presented by Smania that misrepresentations in their affidavits and motions had been articulated by the defendants and their lawyers. The Magistrate, allegedly after "careful review," stated he did not find anything scandalous or impertinent. The Magistrate's discussion of Rule 4(d)(2) was limited to the fact that although Smania had filed a motion pursuant to said rule she did not comply with Local Rule 3.01(g). Absolutely no reference was made by the Magistrate to the "spirit of the law" embodied in Rule 11(FRCP) despite his discussion of the "law" espousing the theory that default judgments against the defendants would interfere with their due process rights.

Apparently emboldened by the magistrate's decisions, Richman and Benjamin filed two more documents berating Smania's "defective" ability to adequately articulate procedural and substantive argument in the court. (DE 49 & 50). And finally, in one last footnote, they claimed that Smania had violated

the "safe harbor provision of Federal Rule of Civil Procedure 11(c)(1)(A)." (DE 50, Footnote 4)

Shortly after Richman and Benjamin's memoranda claiming substantive and procedural defect in Smania's filings, Smania noticed the court that she was withdrawing any inferred consent to the Magistrate's jurisdiction and was going to apply for an Interlocutory Appeal to address the legal contextual meaning of the word **"duty."** (DE 52) Smania expressed her concern that three months had passed since she filed the law suit and her sincere efforts to follow the rules and effectuate an orderly process had been met with resistance at all junctures. Smania attached to the memorandum an exhibit of the docket as it had been formulated when she initially responded to the Benjamin- Richman motion to extend time as an example of her concern. (DE 52, Exhibit B) The docket, at that time, did not memorialize the magistrate's refusal to recuse himself. Instead, at a point subsequent, an order to deny Smania's "Certificate of Interested Persons" was entered. That order not only obfuscated the numbering references on motions Smania had filed, but also insinuated that Smania exemplified a class of unreasonable litigants. "The Court does what it can to accommodate *pro se* litigants." (App. J)

Smania motioned the District Court to Certify an Interlocutory Appeal pursuant to Fed.R.Civ.P 77(a) on May 15, 2003. (DE 54)

Two weeks passed, and with no acknowledgement of Smania's Motion to Certify an Interlocutory Appeal, the Court threatened Smania with dismissal stating that she had not filed a case management report required by Local Rule 3.10. (App. G)

Smania responded by directing the court's attention to a copy of a letter she had previously filed (DE 35, Exhibit A) in which she specifically requested that the attorneys cooperate with her to fulfill the requirements of the local rule. (DE 56) She simultaneously filed a motion to compel response to her motion for certification of an interlocutory appeal. (DE 57) Benjamin, Richman, and Neal, Gerber & Eisenberg responded in pertinent part by claiming her motion was "patently insufficient." (DE 58) Abrams and Abrams & Chapman did not respond at all.

The day after Benjamin, Richman, and Neal, Gerber & Eisenberg responded, the Court denied Smania's motion for certification of an interlocutory appeal and reformulated it into an objection to the Magistrate's orders. Her motion to compel was declared moot. However, the court informed the parties that it, and not the magistrate, would assume jurisdiction over the Defendants motions for dismissal after a "*de novo* determination on the issues based upon the complete record." (App. F)

Two days later the court reformulated all of Smania's motions and her certificate of interested persons into "objections" of the Magistrate's orders and then, in one full swoop, "overruled" the objections it had just created. (App. E) It simultaneously granted all of the defendants motions to dismiss, stating in pertinent part that "the Court [considered] whether the exercise of personal jurisdiction over the Defendants [comported] with due process under federal constitutional law." (App. D). The court did not acknowledge any of Smania's Rule 11 argument nor gave any consideration to the fact that Smania provided documentation of the defendants' false statements and misrepresentations. The Court ignored Smania's concern that her 5th Amendment rights had been compromised when the defendant

attorneys disclosed her privileged communication without the prior authority of the court.

Smania timely motioned for a reconsideration on the grounds that the court had determined erroneous facts as "uncontroverted evidence." (DE 63) Abrams and Abrams & Chapman responded that they acknowledged the disputed fact, but it did not change their position regarding grounds for dismissal (DE 64). Benjamin, Richman, and Neal, Gerber & Eisenberg did not respond at all. The court denied Smania's motion for reconsideration, stating that even if it had made the purported factual error it would not change its conclusion to dismiss the case. (App. C)

Smania appealed to the 11th Circuit. On August 1, 2003, Smania timely filed her Appellant's brief in the United States 11th Circuit Court of Appeal. Jurisdiction was sought in part pursuant to FRAP 46(c), which gives the Circuit Court disciplinary jurisdiction over the attorneys who practice before it. The brief detailed, on a day by day basis, the activity which had ensued in the District Court, and argued that a double standard had been applied which resulted in an abuse of discretion suborning perjury and the unethical publication of privileged communication.

Richman, Benjamin, and Neal, Gerber & Eisenberg did not answer nor did their legal representatives file a notice of appearance. Shutts & Bowen, acting on behalf of the Abrams respondents, apparently sought an extension of time and then filed a brief which essentially avoided the issues Smania argued.

On September 20, 2003, Smania timely filed her reply brief. The gist of the reply brief was that the author of the answer

brief had devised a false record through a convoluted scheme of referencing in violation of 11th Cir.R. 28-1(i.)(ii.), which strategy of convolution echoed his and his clients' behavior in Florida's Middle District Court.

On February 4, 2003, a panel for the U.S. Court of Appeal for the 11th Circuit rendered a decision that determined facts not in evidence and affirmed the lower court's dismissal of the case. (App. B) No consideration was given to the issues actually argued by Smania.

Smania motioned the Circuit Court for a Rehearing En Banc. Eight months passed. Then, on September 8, 2004, Smania's motion was denied because "no Judge in regular active service on the court [requested] that the court be polled on rehearing en banc." (App. A)

Summary of the Argument:

Article III of the *United States Constitution*, as adopted on September 17, 1787, vests judicial power in the Supreme Court and "in such inferior courts as the Congress **[not the Judiciary]** may from time to time ordain and establish." The framers did not delineate any behavioral responsibilities for the judiciary, although it did for the executive and legislative branches in Articles I and II of the Constitution

The onus of moral responsibility in the exercise of government by its officers was defined eleven years prior:

> "But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to

> reduce them under absolute Despotism, **it is their right, it is their duty**, to throw off such Government, and to provide new Guards for their future." (Emphasis Added) (*Declaration of Independence*, Adopted by the Second Continental Congress, July 4, 1776)

On February 24, 1803, the United States Supreme Court, by a vote of 5-0, defined the legal obligation of the judiciary as an institution of governance in this country:

> "It is emphatically **the province and duty of the judicial department to say what the law is.** Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." (emphasis added) (*Marbury v. Madison*, 1 Cranch, 137, 177 (1803))

Seventy-five years later, on August 21, 1878, the American Bar Association ("ABA") was founded.

It is the Petitioner's argument that the process of judicial review, wherein the Judiciary adjudicates the constitutionality of acts of the Legislative and Executive Branches, while maintaining an amorphous immunity to judicial review of its own behavior, is in and of itself unconstitutional. Further, the Petitioner argues that the traditional relationship that the Judiciary has maintained with the ABA, and its affiliate state bars, violates the Separation of Powers. This Petition for Writ of Certiorari should be granted by the Court to either restore a self correcting mechanism compatible with a Constitutionally formulated independent Judiciary or to release its supervisory jurisdiction over members of the bar to the Attorney General of the United States.

Argument

I. The decision of the Circuit Court to ignore Petitioner's Questions of First Impression raises serious doubt as to the effectiveness of the Appellate Process in exercising supervisory jurisdiction over the errant behavior of the Court's own officers.

The Magistrate demonstrated that separation of powers is what one judge sitting in a court room says it is no matter what the founders may have intended. The Magistrate had a material interest in portraying the Petitioner as unreasonable to the Court. However, instead of recusing himself, he facilitated a denigration of the Court's integrity by its own officers, which denigration was upheld by both the District Court and the Circuit Court.

James Madison, in his discussion of the potential danger of the excessive abuse of power which may occur in the legislature if there is not an effective system of checks and balances, had this to say about a fundamental principle of a free society:

> "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time...."(*Federalist* paper no. 10, 1787)

Unfortunately, the attitude that the "courts" belong to the people who administer them, and not to "We, The People," is not unique to the Magistrate challenged in this case. In 1996, United

States Supreme Court Justice, David Souter, stated to a Senate Subcommittee, "The day you see a camera come into **our** courtroom it's going to roll over my dead body." (Emphasis added) (S. 3086, as reported in *Roundup,* Fall 2000 (Vol. 24, No. 4, Page 37))

The Rules Enabling Act, 28 USC § 2072, provided the Judiciary with a unique power. The District Courts promulgate their own rules and procedures under the authority of 28 USC § 2071(a), but the rules are not reviewed by a separate branch of government. Instead, they are reviewed by the Judicial Council, pursuant to 28 USC § 332(d)(4), which is made up of the chief judge and an equal number of judges from the circuit and district courts. The Judicial Council follows the lead of the Judicial Conference, which is established under 28 USC § 331, and is administrated by the Chief Justice of the United States. The Judicial Conference exercises its authority to review and amend the rules under an ambiguous authority known as Chapter 16. "The Conference is authorized to exercise the authority provided in Chapter 16 of [Title 28] as the Conferenee." In other words, in the Judiciary, the same people who make the rules regarding the functioning of judicial actors also enforce those rules. Thus, it is highly unlikely that an "outsider" can initiate judicial review of judicial behavior in the context of litigation. However, at the very heart of the judiciary is judicial review.

There is no avenue available to litigants to petition Congress to review a concerted discretionary abuse of the rules, albeit unconscious, in the context of litigation. The parties must rely on the integrity of the Appellate Process for a system of checks and balances to work in the Judicial Branch.

However, because the Appellate Court has the "ultimate" power to "say what the law is," the law can be whatever is convenient to those members of the bar who control the court at any period in time despite what Congress says the law is or how rights are defined in the Constitution.

The magistrate, at the time of his heavy handed determination to undermine the Petitioner's standing in this case was only one actor. He was concertedly joined by other judicial officers in the District Court to keep the Petitioner's standing on unequal footing. These "officers" included the chief judge, the presiding judge and the attorneys, including the defendants, all of whom are members of the bar. (See Preamble to *ABA Model Rules of Professional Conduct*, (1), "A lawyer,.....an officer of the legal system....having special responsibility for the quality of justice...."; See also ABA Website, *How A Court Works*, www.abanet.org, "The lawyers for both sides are also officers of the Court." (Emphasis in the original)

In the District Court the Petitioner was vehement about withdrawing jurisdiction from the Magistrate. However, unbeknownst to the Petitioner, two weeks prior to the District Court's decision to overrule "Smania's objection" to the magistrate's jurisdiction, the United States Supreme Court, by a vote of 5 to 4, held that consent to a Magistrate's jurisdiction can be "inferred from a party's conduct during litigation." (*Roell v. Withrow*, ____U.S.___, 123 S.Ct. 1696 (2003)) Despite the provisions of the plain language statute, as applied to 28 USC § 636 and Fed.R.Civ.P. 73, which require signatory expressive consent to a magistrate's jurisdiction, the Court rationalized that "there is good pragmatic reason to think that Congress intended to permit consent."

Justice Clarence Thomas dissented. "In my view, this interpretation of §636(c)(1) is contrary to its text, fails to respect the statutory scheme, and raises serious constitutional concern." *Ibid.* Justice Thomas was joined by Justice Stevens, Justice Kennedy, and Justice Scalia. It should be noted that Justice Scalia previously expressed the dissenting sentiment in an essay published six years prior to the decision in *Roell.*

> "[There] have always been, as there undoubtedly always will be, willful judges who bend the law to their wishes....But whether life-tenured judges are free to revise statutes and constitutions adopted by the people and their representatives is not merely [a] question of some "importance," but a question utterly central to the existence of democratic government. (*A Matter Of Interpretation-Federal Courts and the Law,* by Antonin Scalia, Princeton University Press, (1997), p.131, 133)

II. The Court should give meaning to the Rules of Court by defining the word "duty."

28 USC § 2072 appears to rationalize an incestuous system of checks and balances. This unique immunity from constitutional standards has been employed by the United States Supreme Court to protect the discretionary function of the judicial actors in the District Court over the rights of the parties to litigation. In a decision delivered by Justice O'Connor in *Cooter & Gell v. Hartmarx Corp,* 496 U.S. 384, 402, 403, 404, (1990) the Court stated:

In considering whether a complaint was supported by law

and fact "to the best of the signer's knowledge, information, and belief," a court must make some assessment of the signer's credibility. Issues involving credibility are normally considered factual matters. See Fed. Rule Civ. Proc. 52; see also *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952).

[T]he Court indicated that "'as a matter of the sound administration of justice'" deference was owed to the "'judicial actor...better positioned than another to decide the issue in question.'" *Pierce v. Underwood*, 487 U.S. 552, at 559-560, quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts' ability from the **duty** of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation. (Emphasis added)

Interesting word, "duty." It appears abundantly in the opinions of the Court and in the ABA's *Compendium of Professional Responsibility*. However, it is not in the Constitution and does not appear to be enforceable in the context of the *Federal Rules of Court* as amended to May 21, 2002.

In its decision to affirm the District Court's dismissal of Smania's lawsuit, the 11th Circuit took it upon itself to imply to the Petitioner that the "duty," as stated in Fed.R.Civ.P. 4(d)(2) to

avoid costs of serving a summons was unenforceable even though all the rules were followed to their letter regarding service of a summons on at least two of the Defendants.

So why define a behavior as a duty in the rules of court when the judicial officers, including attorneys who are the repeat players in the system, know that said "duty" is nothing more than an insignificant obscurity. This Court must define the word "duty" as an enforceable legal obligation, and exert its personal supervisory jurisdiction over members of the bar.

III. The Court should declare the safe harbor provisions embodied in the rules of court unconstitutional.

Through 28 USC § 2072 Congress has empowered the Court to promulgate its own rules. However, there is no rule which requires adherence to the Constitution. Instead the rules facilitate unscrupulous manipulation of the Constitution.

Indeed, Fed.R.Civ.P. 1 identifies the purpose of the rules as being economic in nature. "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Is this what the framers intended? Eighty-six rules, infinite cross referencing, thousands of local rules, and over thirty-five forms to make the administration of justice fast and cheap? Or do the rules simply concentrate the Judiciary's power in members of the legal profession who are repeat players, giving them an advantage over *pro se* litigants not schooled in the art of obfuscation?

Florida's Middle District has rules purporting to control attorney behavior. However, when two of the attorney defendants, Abrams and Benjamin, filed documents directly into the Middle District of Florida, the District Court did not subject them to its personal supervisory jurisdiction, pursuant to Fed.R.Civ.P. 11. Despite Smania's argument regarding the spirit of law embodied therein and her documentation of the falsity of the lawyers' representations, Rule 11 and the local rules were ignored. Instead, the Court denied personal supervisory jurisdiction, which denial was supported by the Appellate Court by avoiding the issue of what purpose Rule 11 is intended to serve. Additionally, the Circuit Court not only denied personal supervisory jurisdiction over the defendant attorneys but their attorneys as well.

Fed.R.Civ.P. 11(c)(1)(A) states in pertinent part:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but **shall not be filed with or presented to the court** unless, within 21 days after service of the motion (or such other challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. (emphasis added)

When Smania motioned the District Court pursuant to the "spirit of the law embodied in Rule 11," she encouraged the court to impose sanctions, and she also claimed, in her Appellate Brief, that it was incumbent on the Circuit Court to impose sanctions. Because the District Court believed it was Illinois and not Florida that had a material interest in the alleged legal

malpractice of the Defendants, the Defendants' attorneys, who were all members of the Florida Bar, were literally "forgiven" their participation in what transpired in Florida's Middle District. Which court has personal jurisdiction over them? Certainly not Illinois and certainly not the Florida Bar, despite what the magistrate may think regarding the Bar's independent power.

Perjury is a crime. (18 USC § 1621) A crime is a "social harm that the law makes punishable." *Black's Law Dictionary*, 7th Edition. In a monarchy, a crime is an offense against the crown. In a republic, such as ours, a crime is an offense against the people. "A positive or negative act in violation of penal law; an offense against the State or United States. *Black's Law Dictionary*, 5th Edition.

Model Penal Code, Section 241.1 states:

> "A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truths of a statement previously made, when the statement is material and he does not believe it to be true."

Once perjury has been committed, the deed has been done. No other officers of government, including, but not limited to, former President William Jefferson Clinton, have safe harbor to withdraw from the court's purview an intentionally formulated false or misleading statement made under penalty of perjury. (See *Jones v. Clinton*, 206 F.3d 811 (8th Cir. 2002))

So, why can attorneys get together, pursuant to Fed.R.Civ.P. 11(c)(1)(A), and make a deal to cover-up alleged

perjurious statements and the material effects they have on the consciousness of the court? Because, according to the Advisory Committee Notes on 1993 amendments to Rule 11 (FRCP), "The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1." In other words, the court has delegated its power to litigants and/or their attorneys to settle allegations of perjury so that the administration of justice can be fast and cheap.

There is something else distressing about Rule 11. That is the direction it gives to the court to facilitate perjury.

No officer of the judiciary has pardon power. Article II, Section II of the United States Constitution gives pardon power to the executive branch only. However, through Rule 11 the Judiciary has usurped that power.

Fed.R.Civ.P. 11 states in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresentative party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on the lack of information or belief. Fed.R.Civ.P. 11(b)(4)
>
> On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party

to show cause why it has not violated subdivision (b) with respect thereto. Fed.R.Civ.P. 11(c) (1)(B)

There is no directive stating what the court **shall do** when confronted with **blatantly perjurious written statements.**

The 1993 Amendment advisory notes for Rule 11 state:

> The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; **referring the matter to the disciplinary authorities** (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head, etc.) See *Manual for Complex Litigation, Second,* § 42.3." (Emphasis Added)

The court cannot delegate its powers to a nongovernmental adjudicating body. It violates the principle of Nondelegation and is invalid. (See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) "[It is delegation] in its most obnoxious form, for it is not even delegation to an official or an official body, presumably disinterested, but to private persons whose interest may and are adverse to others in the same business.")

Under the current administration the Executive Branch of government has begun to recover some of its power previously delegated to the privately financed Bar.

> "There is a long tradition by which Members of Congress, interest groups, and individual citizens provide

> suggestions to the President about potential judges. We will continue to welcome such suggestions from all sources, including the ABA.....But considerations of sound constitutional government suggest that the President not grant a preferential, quasi-official role in the judicial selection process to a politically active group." (Letter to ABA from Albert R. Gonzalez, then Counsel to the President, George W. Bush, dated March 22, 2001, breaking the tradition that the ABA evaluation committee screens candidates for federal court judgeships prior to nomination. Available at www.whitehouse.gov/news/releases)

Article III of the United States Constitution vests judicial power in the Supreme Court and those "inferior" courts as the Congress appoints, not as the Judiciary appoints. The Bar Associations, including integrated State Bars, have not been appointed by Congress to act with any governing authority in the United States Judiciary. The United States Supreme Court has determined that even integrated State Bars, wherein membership is a requirement for practicing law pursuant to State law, do not have standing as governmental agencies in the United States Judiciary. (*Keller v. State Bar of California et al.*, 496 U.S. 1, 2 (1990), "In contrast, there is substantial analogy between the relationship of the Bar and its members and that of unions and their members.")

Additionally, if the bars had governing power not authorized by Congress how could a system of checks and balances be applied to activity which would be impeachable. Congress cannot impeach, for example, a bar president who has acted unethically or committed a crime.

No rule of Court should delegate the Judiciary's power to any individuals or associations which have not been appointed by Congress. Safe harbor, in the context of the rules of court wherein litigants are instructed to keep allegations of perjurious and other inflammatory filings from the purview of the court so as to conserve on costs of litigation, is unconstitutional. It is incumbent on the court to direct itself to respect the jurisdiction of governing bodies consistent with the provisions of the Constitution and not with the interests of the legal profession.

IV. The Court should condemn, as unconstitutional, the practice of publication of privileged information by an attorney or a law firm to protect the attorney or the law firm from accusations of wrongful conduct, without the expressed authority of the Court.

Congress has no "rule-making" authority in the bars, nor does the executive branch have the authority to challenge the bar's disciplinary rules as dangerous to the public interest. Bars are privately financed from the dues of their members, are housed on private property, and, just like a condominium, can formulate any rules they choose to enhance the lives of the people live "there."

For example, Disciplinary Rule 4-101(C) of the *American Bar Association Model Code Of Professional Responsibility (2003)* asserts that: "A lawyer may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct." Following is Disciplinary Rule 4-101 (D) which states in pertinent part "that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."

It is highly unlikely that a client or potential client of a lawyer or law firm is aware of the fact that, pursuant to the ABA's governing authority, the code of confidentiality does not apply if the client decides to sue the attorney for malpractice. The internal disciplinary rule is even applicable if the attorney perceives that alleged fees are due and the client refuses to pay. It does not serve the public interest to have the means for extortion so readily available to a profession which has as its legacy a plethora of lawyer jokes promulgated by late night T.V. hosts. Such insidious practice violates the clients' Fifth Amendment right to protection from self incrimination.

The underlying legal malpractice lawsuit filed in the District Court had to do with the fact that Smania had inadvertently become involved in a fraud on the IRS leaving her personally vulnerable to claims or charges by that agency. If, as a result of the defendant lawyer's conduct. Smania had disclosed something in her letters which would have incriminated her as consciously participating in the alleged fraud, and that fact was published by an attorney who simply wanted revenge, wouldn't the Petitioner's right to not incriminate herself have been violated? Of course, it would have. Instead, in response to Smania's argument, in part, that the offending document was written by a Defendant who did not take an oath, the Magistrate wrote, "Plaintiff is wrong" as though the Pro Se Petitioner had no right to even cross examine or impeach the attorney defendant who had published her letters. (App. H)

It is a curious relationship that has developed between the Court and members of the bar. The visible link appears to be that an oath is taken to uphold the Constitution, which oath is shared

with the other two branches of government.

In *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)), the Court reasserted its province of judicial review over acts of Congress. "Congress is a co-equal branch of government whose members take the same oath we do to uphold the Constitution."

However, it's not just Congress that is subject to judicial review. In reviewing the activity of the office of the attorney general, the United States Supreme Court asserted that, "[The] Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the constitution and who have the responsibility for carrying on government." (*Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 164 (1951))

The oath appears to be the super glue of bonding between the legal profession, the Court, and its power. In order to qualify for admission to the Bar of the United States Supreme Court

> Each applicant shall sign the following oath or affirmation: I,……, do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States." (Supreme Court Rule 6)

Didn't all the members of the bar already take that oath?

This Court should prohibit the publication of privileged communication without the expressed authority of the Court. It should be incumbent on the Court to consider the relevancy of the privileged information to the issue at hand, weigh the client's 5th

Amendment rights against the public interest, and give meaning to the oath that members of the bar take to uphold the Constitution.

Conclusion

The Court should grant the Petition For Writ of Certiorari.

Respectfully Submitted,

Mary Ann Smania

Mary Ann Smania,
Petitioner *Pro Se*